Supreme Court, U. S.
FILED
JUL 10 1979
MICHAEL RODAK, JR., CLERK

79-48
No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR, ET AL., PETITIONERS

v.

GLOVER CONSTRUCTION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior and the other appellants below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-31a) is reported at 591 F.2d 554. The opinion of the district court (App. D, *infra*, 34a-58a) is reported at 451 F. Supp. 1102.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 32a) was entered on January 11, 1979, and

the Secretary's petition for rehearing was denied on March 12, 1979 (App. C, *infra*, 33a). On May 30, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including July 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Buy Indian Act, 25 U.S.C. 47, authorizes the Secretary of the Interior to enter into road construction contracts with Indian-owned companies without publicly advertising pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 253.

STATUTES INVOLVED

The Buy Indian Act, 25 U.S.C. 47, provides:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

Section 302 of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252, provides in pertinent part:

> (a) Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

> (1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or
>
> (2) when this subchapter is made inapplicable pursuant to section 474 of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.
>
> * * * * *
>
> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> * * * * *
>
> (10) for property or services for which it is impracticable to secure competition;
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> * * * * *
>
> (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.
>
> * * * * *
>
> (e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings,

roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section.

Section 303 of the Act, 41 U.S.C. 253, provides:

Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided,* That all bids may be rejected when the agency head determines that it is in the public interest so to do.

Section 310 of the Act, 41 U.S.C. 260, provides:

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title.

STATEMENT

1. The Buy Indian Act, 25 U.S.C. 47, directs the Secretary of the Interior to employ Indian labor "[s]o far as may be practicable," and permits him to purchase "the products of Indian industry * * * in [the] open market * * *." Pursuant to the Act, the Bureau of Indian Affairs (BIA) of the Department of the Interior permits only Indian-owned firms to bid on its contracts (see App. E, *infra*, 59a-67a). BIA invited three Indian-owned construction companies to bid on a five-mile segment of road in Pushmataha County, Oklahoma, and on May 25, 1977 BIA awarded the contract to Indian Nations Construction Company, a wholly Indian-owned corporation (App. A, *infra*, 2a-3a). Respondent, a non-Indian corporation, was not afforded the right to bid for the contract (App. D, *infra*, 39a).

Respondent then instituted this action in the United States District Court for the Eastern District of Oklahoma, naming as defendants the Secretary of the Interior, the Department itself, the BIA, and the BIA contracting officer. Respondent contended that the Buy Indian Act provided no authority for the negotiation of road construction contracts, and that the government was required to advertise for bids pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252, 253.[1]

The district court granted summary judgment for respondent (App. D, *infra*, 34a-58a). The court concluded that the case was governed by 41 U.S.C. 252(c) and (e). Section 252(c) provides that agency purchases and contracts for property and services "shall be made by advertising, as provided in section 253," unless one of 15 enumerated exemptions is applicable. Subsection 252(e)(B) provides that Section 252 shall not be construed to authorize any contract for the construction of roads to be negotiated without advertising as required by Section 253 "unless negotiation of such contract is authorized by the provisions of paragraph (1), (2), (3), (10), (11), (12), or (14) of subsection (c)." The court rejected the contention that the Buy Indian Act exempted the Secretary from these requirements, noting that even

[1] Respondent also contended that the government had violated 41 U.S.C. 5, and had denied respondent due process. The district court held (App. D, *infra*, 39a) that 41 U.S.C. 5 was not applicable, and it declined to reach respondent's constitutional claims (App. D, *infra*, 46a-47a).

though Section 252(c)(15) provides a general exemption from the advertising requirements when "otherwise authorized by law," exemption (c)(15) was not made applicable to construction contracts under Section 252(e)(B). The court concluded that it was significant that "Congress saw fit to specifically exempt *seven subsections* of section 252(c) from the advertising requirements with respect to road construction contracts and did *not* include the 'otherwise authorized by law' provision of subsection (c)(15) within this category" (App. A, *infra*, 40a-41a; emphasis in original).

The court rejected the Secretary's administrative construction, finding that the proper construction of Section 252(c) and (e) "is not doubtful and the rule of deference by the court to an administrative interpretation has therefore no application" (App. D, *infra*, 45a-46a). The court also noted (App. D, *infra*, 46a) that the administrative interpretation was not contemporaneous with the enactment of either the Buy Indian Act or the Federal Property and Administrative Services Act.

The final judgment, entered on May 12, 1978, declared the road construction contract entered between BIA and Indian Nations null and void and permanently enjoined BIA from "circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future road construction contracts" (App. D, *infra*, 58a).

2. The government appealed, and a divided panel of the court of appeals affirmed (App. A, *infra*, 1a-31a). The majority first quoted at length from the

district court's opinion (App. A, *infra*, 7a-13a). It then rejected the government's argument that the district court had erroneously treated the Federal Property and Administrative Services Act as impliedly repealing the Buy Indian Act, contrary to the teaching of *Morton* v. *Mancari*, 417 U.S. 535 (1974). The majority distinguished *Mancari* on the ground that, unlike the statute providing for a federal employment preference for Indians, which dealt with precisely the same subject matter as the later provisions prohibiting racial discrimination in federal agencies, there was nothing to suggest that the Buy Indian Act was ever intended to apply to road construction contracts (App. A, *infra*, 13a-15a). The court pointed out (App. A, *infra*, 17a) that at the time Congress enacted the Federal Property and Administrative Services Act, it was "fully cognizant of the Buy Indian Act," and was "capable of clearly and directly providing the interpretation of the Buy-Indian Act here urged by the Government." Concluding that Congress "did not elect to do so," the majority refused to " 'fill the gap' by engaging in judicial law-making" (*ibid.*).[2] Indeed, the majority commented that "[i]n our view, we are here dealing with a political question beyond the jurisdiction of the courts" (*ibid.*).

[2] In this connection, the court noted (App. A, *infra*, 17a) the government's argument that no weight should be given to the fact that the legislative history of the Buy Indian Act contained no reference to road construction, since no Indian-owned construction companies were then in existence. The court commented (*ibid.*) that, assuming the truth of that contention, there had been no showing that that argument had been made to the Congress that enacted the Federal Property and Administrative Services Act.

The court observed (App. A, *infra*, 16a-17a) that "an unambiguous statute must be given its plain and obvious meaning," and "construed as it was intended to be understood when enacted in the light of conditions as they then existed." And, it argued, when one statute speaks to a subject in general terms, and another in specific and detailed terms, the more specific act—here the provision of the Federal Property and Administrative Services Act dealing with road construction contracts—should control if there is a conflict (App. A, *infra*, 18a).

The court recognized "that the remedial Buy-Indian Act is to be given a liberal construction in order to effectuate the purpose for which it was enacted," but it concluded that "it strains the most liberal interpretation to conclude that the Act's preference for purchase of 'Indian supplies' and 'products' applies to a roadway construction project whose contract price, through Indian Construction, is $1,219,-481.00" (App. A, *infra*, 19a). Noting that the contract price was significantly higher than respondent's bid, the majority observed that "a primary, significant *remedial* feature of the advertisement and competitive bidding requirements of the Federal Property and Administrative Services Act of 1949 is to obtain the best and lowest bid for the benefit of the American taxpayers in 'high cost' construction categories" (App. A, *infra*, 19a-20a; emphasis in original). The ma-

jority concluded (App. A, *infra*, 20a) that "a statutory exception should be strictly construed so that the exception does not devour the general policy which the law embodies."

Judge McKay dissented (App. A, *infra*, 21a), arguing that the court had "reache[d] a result hostile to the remedial purposes of the Buy Indian Act" because of rigid adherence "to formalistic rules of statutory construction." Judge McKay identified "[t]he real issue in this case" as the extent to which the Buy Indian Act "retains vitality in light of the advertising requirements of the Federal Property Act" (*ibid.*). He observed (App. A, *infra*, 22a) that "[t]he Buy Indian Act announces a congressionally approved policy of preferring Indian labor and products and grants the Interior Secretary discretionary power to purchase Indian products on the open market," and that pursuant to that policy the Department of the Interior had established a road construction program that "has provided substantial economic encouragement to Indian construction enterprises." He argued that "[t]he obvious purpose of the Buy Indian Act is to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements," and that even though the legislative history of the Act "is rather scanty, it nonetheless manifests a clear purpose to except purchases of Indian products from advertising requirements" (*ibid.*). Despite the remedial purpose of the Act, the majority had found it inapplicable "because nothing in the language of the Act or in its legislative history indicates it was

intended to apply to road construction projects" (App. A, *infra*, 25a-26a). As Judge McKay pointed out, "[i]mplicit in this conclusion is the troubling notion that because a particular economic activity is not mentioned in the Act or in its legislative history, that activity is not covered. Such a construction," he contended, "may make the Act applicable to nothing at all" (App. A, *infra*, 26a; footnote omitted). In his view, the Act should not be limited to Indian economic activities that were actually being conducted in 1910, and the dissent concluded that the majority's ruling "threatens to relegate [the Buy Indian Act] to a role of protecting Indian handicraft and trinket production—economic activities that probably require no preferential treatment at all" (App. A, *infra*, 27a).

Judge McKay also argued that the majority's opinion conflicts with this Court's teaching that "statutes passed for the benefit of [Indians] are to be liberally construed, doubtful expressions being resolved in favor of Indians" (App. A, *infra*, 27a, quoting *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976)). "I simply do not understand," he wrote (App. A, *infra*, 28a; footnote omitted), "why we decline to apply the meaning of the word 'product' in a way that actually does some good." The teaching of *Morton* v. *Mancari*, he urged, required the court to "sustain both" the Buy Indian Act and the Federal Property and Administrative Services Act, "in a way that vitiates neither" (App. A, *infra*, 31a; footnote omitted).

Finally, Judge McKay argued (App. A, *infra*, 31a n.10) that in any event the injunction granted by the district court would improperly preclude the Secretary from determining, in his discretion, whether negotiation with Indian firms might still be proper pursuant to 41 U.S.C. 252(c)(10), an exemption from the federal advertising requirements where competitive bidding would be "impractical."

The government's petition for rehearing was denied on March 12, 1979; Judge McKay voted to grant rehearing (App. C, *infra*, 33a).

REASONS FOR GRANTING THE PETITION

The court of appeals' narrow reading of the Buy Indian Act is unprecedented, and wholly at odds with the remedial purpose of the statute. The decision also ignores both the legislative history and the language of the Federal Property and Administrative Services Act, each of which shows unmistakably that existing exemptions from the general federal advertising requirements—including the Buy Indian Act—were to be preserved.

Although the court of appeals' decision is one of first impression, its consequences are so serious that review by this Court is now warranted. The ruling, if permitted to stand, will effectively terminate a federal program that has provided millions of dollars of business each year to Indian-owned businesses. The Secretary informs us that, in the last year unaffected by the district court's injunction, BIA

awarded more than $11 million worth of road construction contracts to Indian-owned companies. This business provided an important source of income to Indian businesses and a significant source of employment on various reservations, substantially improving the economic base of those reservations. Many of these companies are in the Tenth Circuit, and if the court of appeals' decision becomes final the Secretary anticipates that most of those firms will be forced out of business. Moreover, the court's narrow reading of the Buy Indian Act is likely to be followed, at least in that circuit, in cases involving other kinds of BIA construction contracts that are now awarded to Indian-owned firms without public advertising. Since road construction contracts account for only a small portion of the construction contracts BIA now negotiates pursuant to its interpretation of the Buy Indian Act, the Tenth Circuit's view of the Buy Indian Act will have a serious adverse impact on a very large number of Indian businesses.

1. The inclusive language of the Buy Indian Act, 25 U.S.C. 47—which generally embraces "Indian labor" and all "products of Indian industry"—applies to the products of the Indian construction industry, as well as the products of Indian pottery, jewelry, and weaving industries. As this Court has previously recognized, a common purpose of the Buy Indian Act and other Indian preference enactments is "to further the Government's trust obligation toward the Indian tribes." *Morton* v. *Mancari*, *supra*, 417 U.S.

at 541-542 (footnote omitted). Judge McKay correctly recognized (App. A, *infra*, 22a) that the Buy Indian Act was intended to achieve this goal by "encourag[ing] Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements."

Although the legislative history of the Act is sparse, it does indicate that Congress intended both the current Buy Indian Act and its predecessor, the Act of April 30, 1908, ch. 153, 35 Stat. 71, to be broad enough to apply to construction contracts, since there were references in the debates on both acts to contracts for the construction of irrigation systems. 42 Cong. Rec. 1695 (1908) (remarks of Rep. Sherman); 45 Cong. Rec. 6097 (1910) (remarks of Rep. Burke).

In light of the remedial purpose of the Act and the settled rule that such " ' "statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed," ' " *Wilson* v. *Omaha Indian Tribe*, Nos. 78-160 & 78-161 (June 20, 1979), slip op. 10, the court of appeals erred in concluding that the Buy Indian Act can have no application to road construction contracts. Even if the brief legislative history contained no reference to any type of construction contract, that would not relieve the court of its "duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." *United States* v. *Bornstein*, 423 U.S. 303, 310 (1976).

2. The court of appeals also erred in concluding that the advertising requirements applicable to road construction contracts under the Federal Property and Administrative Services Act, 41 U.S.C. 252(e)(B) and 253, permit no exception for contracts negotiated under the authority of the Buy Indian Act.

The Buy Indian Act was enacted as a proviso to a statute that subjected the Indian Service (BIA's predecessor) to the only advertising statute then in effect, Section 3709 of the Revised Statutes (which is currently codified as 41 U.S.C. 5). Section 23 of the Act of June 25, 1910, ch. 431, 36 Stat. 861, stated:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.[3]

In 1965, when the more detailed procurement and advertising requirements of the Federal Property and Administrative Services Act were extended to executive agencies generally, including BIA, in lieu of the provision originally contained in Section 3709, Congress preserved and carried over existing exceptions to Section 3709—including the Buy Indian Act. Sec-

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[3] The portion of this section preceding the proviso, which was codified at 25 U.S.C. 93, was repealed by the Act of October 10, 1940, ch. 851, 54 Stat. 1112.

tion 5 of the Act of November 8, 1965, Pub. L. No. 89-343, 79 Stat. 1303, amended Section 310 of the Federal Property and Administrative Services Act, 41 U.S.C. 260, to provide:

> Any provision of law which authorizes an executive agency * * * to procure any property or services without advertising or without regard to said section 3709 shall be construed to authorize the procurement of such property or services pursuant to section 302(c)(15) of this Act [41 U.S.C. 252(c)(15)] without regard to the advertising requirements of sections 302(c) [41 U.S.C. 252(c)] and 303 [41 U.S.C. 253] of this Act.

The Committee Reports confirm that Congress intended to preserve "exemptions from the requirements of Revised Statutes, section 3709 * * * by constituting these as exceptions from the advertising requirements of Sections 302(c) [41 U.S.C. 252(c)] (and 303) [41 U.S.C. 253] of the act pursuant to section 302(c)(15) [41 U.S.C. 252(c)(15)]." H.R. Rep. No. 1166, 89th Cong., 1st Sess. 7-8 (1965); S. Rep. No. 274, 89th Cong., 1st Sess. 5 (1965).

The same intent was evinced in Section 1 of the Act of November 8, 1965, Pub. L. No. 89-343, 79 Stat. 1303, which amended 41 U.S.C. 252(a) to provide that the title containing the new advertising and procurement requirements did not apply where an exception was provided elsewhere:

> Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this title and implementing regulations of the Administrator; but this title does not apply—
>
> * * * * *
>
> (2) when this title is made inapplicable pursuant to * * * any other law * * *.

The Committee Reports stated that Congress intended this provision to "make[ ] clear that the limited exemptions specified * * * in any other law, are not eliminated by this section * * *." H.R. Rep. No. 1166, *supra*, at 7; S. Rep. No. 274, *supra*, at 4.

Since 41 U.S.C. 252(a) and 260 make the entire title—and particularly the advertising requirements of Section 253—inapplicable where there was a preexisting exemption, such as the Buy Indian Act, the court of appeals erred in holding that BIA is required to advertise its road construction contracts. The court's reliance on Section 252(e)(B) was misplaced. Section 252(e)(B) does not, in and of itself, state any advertising requirement. It provides only that, with certain exceptions, Section 252 shall not be construed to "permit any contract for the construction or repair of * * * roads * * * to be negotiated *without advertising as required by section 203*," that is, 41 U.S.C. 253. (Emphasis added). Since the Buy Indian Act exempts BIA from the advertising requirements of Section 253, Section 252(e)(B) stands as no obstacle to BIA's negotiation of road construction contracts pursuant to the Buy Indian Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1979

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

[Filed Jan. 11, 1979]

No. 78-1554

GLOVER CONSTRUCTION COMPANY, APPELLEE,

vs.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF INTERIOR; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; and A. E. GREEN, APPELLANTS

Appeal from the United States District Court
for the Eastern District of Oklahoma

(D.C. No. 78-178-C)

Submitted: September 27, 1978

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

The United States, by and through Cecil Andrus, Secretary of the Department of the Interior, et al., (Government) appeals from a summary judgment entered on behalf of Glover Construction Company (Glover), a non-Indian owned contracting company, setting aside and rendering null and void a road construction contract awarded by the Government, through the Bureau of Indian Affairs (BIA), to Indian Nations Construction Company (Indian Construction), an Indian owned company. The contract was let for the reconstruction of five miles of roadway in Pushmataha County, Oklahoma.

The facts are not in dispute. In March of 1976, Government, through the Commissioner of the BIA, issued a memorandum designated as 20 BIAM Bulletin 1 interpretive of the Buy-Indian Act, 25 U.S.C.A. § 47.[1] The memo provides that bidding on contracts with the BIA is restricted or confined to Indian owned companies. Non-Indian owned companies are permitted to bid only if Indian owned companies are not available to bid or do not bid. Prior to May 25, 1977, the BIA invited three Indian owned construction companies to submit bids on a contract for reconstruction of five miles of existing

[1] 25 U.S.C.A. § 47 provides:

Employment of Indian labor and purchase of products of Indian industry

So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. Apr. 30, 1908, c. 153, 35 Stat. 71; June 25, 1910, c. 431, § 23, 36 Stat. 861.

roadway as provided by 41 CFR § 1-3.215(a) pursuant to the Buy-Indian Act, *supra*. The contract was awarded on May 25, 1977, to Indian Construction, whose bid was $1,219,481.00. No attempt was made by the Government to publicly advertise for bids pursuant to 41 U.S.C.A. § 253,[2] popularly known as the Federal Property and Administrative Services Act of 1949, in relation to its application to the relevant provisions of 41 U.S.C.A. § 252.[3] No conten-

[2] 41 U.S.C.A. § 253 provides:

Advertising requirements

Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned . . .

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest to do so. June 30, 1949, c. 288, Title III, § 303, 63 Stat. 395; July 12, 1952, c. 703, § 1(m), 66 Stat. 594.

[3] 41 U.S.C.A. § 252 provides:

* * * *

Negotiated purchases and contract for property; conditions

(c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and

tions are advanced by Government that the contract here involved was subject to negotiation under the exceptions of paragraphs (1), (3), (10), (12) or (14) of subsection (c) of § 252, *supra.*

Glover contends that the Government violated 41 U.S.C.A. § 5 which provides that purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved does not exceed $2,500.00, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government officer shall so certify, or (4) when

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contracts may be negotiated by the agency head without advertising if—

(10) for property or services for which it is impractical to secure competition.

(15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

Exceptions to this section

(e) This section shall not be construed to: (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) *permit any contract for the construction or repair of* buildings, *roads* sidewalks, sewers, mains, or similar items *to be negotiated without advertising as required by Section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of this title.*" (Emphasis supplied.)

the services are required to be performed by the contractor in person and are of a technical or professional nature or under Government supervision and paid for on a time basis. 41 U.S.C.A. § 5 was originally enacted in 1946. 60 Stat. 809.

Further, Glover contends that the Government was required to publicly advertise for bids pursuant to 41 U.S.C.A. § 253, *supra,* and that the BIA's contracting procedure giving preference to Indians violated Glover's rights to equal protection and due process of law. The Government contends that the contracting procedure is authorized by the Buy-Indian Act, *supra,* and that it is constitutional.

The District Court did not reach the constitutional contentions. The Court did conclude, however, that under the terms of the Federal Property Act, 41 U.S.C.A. § 252, the Buy-Indian Act, 25 U.S.C.A. § 47, could not be applied to road construction contracts; that the contract awarded Indian Construction was null and void; and that the Government (Interior-BIA) should be enjoined from entering into any future road construction contracts without complying with the public advertising requirements.

On appeal, Government contends that the District Court erred in finding and concluding that the BIA (Government) may not enter into road construction contracts with Indian owned contracting companies without publicly advertising for bids pursuant to 41 U.S.C.A. § 253.

The District Court saw the issues framed as follows: In 1976 the BIA implemented its "new" in-

terpretation of the "Buy-Indian Act," *supra*, (which Act had been in effect since 1910) under which the BIA entered into contractual negotiations with wholly owned Indian companies for road construction projects without complying with the advertising requirements of 41 U.S.C.A. §§ 5 and 253; under the "new" interpretation, bids are to be taken only among Indian owned contracting companies and non-Indian contractors are to be contacted and considered for road construction projects only after it has been determined that there are no qualified Indian contractors within the normal competitive area; Government claims that the "new" policy interpretive of the Buy-Indian Act falls within the "otherwise authorized by law" exception to advertising provided by 41 U.S.C.A. § 253(c)(15);[4] Glover contends that 41 U.S.C.A. § 252(e) fails to exempt contracts for the construction of roads from the advertising requirements, since it expressly exempts 41 U.S.C.A. § 252(c)(1)-(3), (10)-(12), and (14) but does not refer to subsection (15); the parties agree that 41 U.S.C.A. §§ 252 and 253 apply to the BIA.

The District Court ruled that the procedure followed by the BIA in awarding the road construction contract to Indian Construction contravenes the requirements of 41 U.S.C.A. §§ 252 and 253. We agree.

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[4] Even though the parties have not referred to the provisions of § 254, *supra*, we observe that Congress has restricted the availability of the "otherwise authorized by law" exception to § 252(c). We do not here decide the applicability of this section to the disposition of the instant case.

The District Court's order is, in our view, worthy of quotation in pertinent part, to-wit:

> Section 252(c) makes all purchases and contracts for property and services *subject to the advertising requirements* of section 253 *unless* they come within any of the fifteen enumerated exceptions. Defendants contend that the Buy Indian Act comes within subsection (15). There is no contention that any of the other fourteen exceptions apply in this case. Subsection (e)(B) specifically provides that section 252 shall *not* be construed to permit any contract for the construction of roads to be negotiated *without advertising* as required by section 253 unless the contract is to be performed outside the continental United States or *unless* negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (14) of subsection (c).
>
> Defendants' argument that subsection (e) is an admonition rather than a prohibition and that subsection (c)(15) authorizes negotiation of road construction contracts under the Buy Indian Act is unpersuasive. Congress saw fit to specifically exempt *seven subsections* of section 252(c) from the advertising requirements with respect to road construction contracts and did *not* include the "otherwise authorized by law" provision of subsection (c)(15) within this category. This is the subsection on which defendants rely.
>
> The effect of the enumeration of express exceptions in a statute has been stated as follows:
>
> The specification by the legislature of ex-

ceptions to the operation of a general statute, does not necessarily operate to preclude the court from applying other exceptions. However, where express exceptions are made, the legal presumption is that the legislature *did not intend to save other cases from the operation of the statute.* Thus, the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made. Under this principle, where a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication. (Emphasis added.)

73 Am.Jur.2d *Statutes* § 316 (1974) (footnotes omitted). The court accordingly concludes that contracts for the construction of roads, such as the contract involved in the instant action, are *not* excepted from the advertising requirements of section 253 by virtue of section 252(c)(15).

Defendants contend, however, that the Buy Indian Act has been interpreted for many years as authorizing construction contracting with invitations to bid restricted to Indian contractors, and that this administrative construction of the statute is entitled to great weight. Plaintiff contends that 20 BIAM Bulletin 1 of March 3, 1976 (Exhibit D to defendants' brief) represents a new policy, and even if not new, that the statutory interpretation therein espoused is entitled to little or no weight since it is not a contemporaneous statutory construction.

Defendants' exhibits establish at best that the interpretation set forth in the 1976 bulletin may date back as far as 1961. Assuming this to be true for the purpose of plaintiff's summary judgment motion it does not follow that such interpretation is entitled to be given great weight, or any weight, upon the question of the proper statutory interpretation.

Defendants rely on *Udall* v. *Tallman*, 380 U.S. 1 (1965), and *United States* v. *Jackson*, 280 U.S. 183 (1930) for the general rule of statutory construction that "great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration." 280 U.S. at 193. The Court emphasized in *Udall*, however, that the Secretary had consistently construed the executive order and public land order there involved since their promulgation and that this interpretation had been made a repeated matter of public record. 380 U.S. at 4, 17. Furthermore, the Supreme Court has recognized that

> [i]t has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. See e.g. *Logan* v. *Davis*, 233 U.S. 613, 627. But the court is not bound by a construction so established. *Chicago &c. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U.S. 97, 99. *United States* v. *Dickson*, 15 Pet. 141, 161. *The rule does not apply in cases where the construction is not doubtful.* And if such interpretation has not been uni-

> form, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States*, 113 U.S. 568, 571. *Merritt* v. *Cameron*, 137 U.S. 542, 551-552. *United States* v. *Alabama Railroad Co.*, 142 U.S. 615, 621. *United States* v. *Healey*, 160 U.S. 136, 145. *Studebaker* v. *Perry*, 184 U.S. 258, 268. *Houghton* v. *Payne*, 194 U.S. 88, 99.

United States v. *Missouri Pacific R.R.*, 278 U.S. 269, 280 (1929) (emphasis added). The Court has also said:

> True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U.S. 760, 763; *Logan* v. *Davis*, 233 U.S. 613, 627; *Brewster* v. *Gage*, 280 U.S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375; *Interstate Commerce Commn.* v. *N.Y., N.H. & H.R. Co.*, 287 U.S. 178. The practice has peculiar weight when it involves a *contemporaneous* construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co.* v. *United States, supra.* (Emphasis added.)

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, 315 (1933). And, the Supreme Court further stated in *Missouri Pacific*:

> The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. *It is elementary that where no ambiguity exists there is no room for construction.* Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation . . . . Construction may not be substituted for legislation. *United States* v. *Wiltberger*, 5 Wheat, 76, 95-96. *United States* v. *Fisher*, 2 Cranch 358, 386. *Lake County* v. *Rollins*, 130 U.S. 662, 670. *Caminetti* v. *United States*, 242 U.S. 470. *Ex parte Public National Bank, ante*, p. 101. *United States* v. *Colorado & N.W.R. Co.*, 157 Fed. 321, 327.
>
> . . . Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or

> impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. *United States* v. *Freight Ass'n*, 166 U.S. 290, 325. *Pennsylvania R.R.* v. *International Coal Co.*, 230 U.S. 184, 199. *Mackenzie* v. *Hare*, 239 U.S. 299, 308. *Caminetti* v. *United States*, *supra*, 490.

278 U.S. at 277-78 (emphasis added).

The court is of the view that construction of section 252(c) & (e) is not doubtful and that the rule of deference by the court to an administrative interpretation has therefore no application in this case. Moreover, even if the rule were applicable, defendants have not shown or even contended that the policy challenged in this action has been in effect prior to 1961. The Buy Indian Act has been in effect since 1910 and 41 U.S.C. §§ 252 and 253 have been in effect since 1949. There is accordingly no contemporaneous interpretation involved in this case. It was held in *United States* v. *Manzi*, 16 F.2d 884 (1st Cir. 1926) that a construction not adopted by the department until after a statute had been in operation for fourteen years was entitled to little or no weight upon the question of the proper interpretation of the statute. *See also Citizen Band of Potawatomie Indians of Oklahoma* v. *United States*, 391 F.2d 614, 621 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 1046 (1968).

> For all of the foregoing reasons and on the basis of the authorities heretofore discussed the court concludes that defendants' procedure in connection with awarding the road construction contract involved in this case contravenes the advertising requirements of 41 U.S.C. §§ 252 & 253. Summary judgment is accordingly granted in favor of the plaintiff and against the defendants. Defendants' cross-motion for summary judgment is denied.
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> [R., Vol. I, pp. 30-33.]

Government's main thrust is that the subject contract does fall within the enumerated exceptions to the advertising requirement, and that, in any event, the list of exceptions contained in 41 U.S.C.A. § 252 (e) was not intended to preclude dispensing with the advertising requirements where independent statutory authority (the Buy-Indian Act) exists. Inasmuch as the Buy-Indian Act is not mentioned or referred to in the Federal Property Act, the Government argues that ". . . the district court must necessarily have concluded that Section 302(e) of the Federal Property Act, 41 U.S.C. 252(e), repealed the Buy-Indian Act in regard to construction and repair contracts only by implication." [Brief of Appellant, p. 8.] This argument, in our view, "misses the mark." The District Court made no reference to the rule relating to repeal by implication of law. The rule does not come into play here simply because, contrary to the Government's claim, *nothing* in the Buy-Indian Act speaks to or directly mentions roadway construction projects. The Government thus

would have us construe the language in the Buy-Indian Act directing purchase of "Indian supplies" and "products" on the "open market" as directly and unequivocally relating to a contract covering a roadway construction project. In pressing the point, the Government relies on Bryan v. Itasca County, 426 U.S. 373 (1976) and Morton v. Mancari, 417 U.S. 535 (1974) for the rule that statutes passed for the benefit of dependent Indian tribes are to be liberally construed and doubtful expressions resolved in favor of the Indians. The *Morton* case involved the issue whether a provision allowing an employment preference to Indians under the Indian Reorganization Act of 1934 was impliedly repealed by Section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e-16(a), which provides that all personnel actions affecting employment in most federal agencies must be made free from discrimination based on race, color, religion, sex or national origin. The Supreme Court held that the latter act did not repeal the former by implication because—and this is critical—the Indian Reorganization Act of 1934 was of a longstanding preference and an important component of the Government's Indian policy. Thus, the Court refused to hold that the provisions of the EEOC Act of 1972 repealed by implication of law the preference provisions of the Indian Reorganization Act. Significantly, the Supreme Court observed that this could come to pass only if the two statutes are *entirely irreconcilable*. Such was not the case in Morton v. Mancari, *supra*. The hiring pref-

erences provided for under the Indian Reorganization Act of 1934 exempted Indians from the Civil Service laws and thus the Act spoke directly to the *same subject matter* as that addressed in the EEOC Act, i.e., employment by federal agencies. It would, in our view, require a considerable "stretch of the imagination" to conclude that the Congress intended the Buy-Indian Act to apply to road construction projects. It is clear, *on its face*, however, that the Congress did intend that 41 U.S.C.A. §§ 252 and 253 apply to road construction projects.

We agree with Glover's analysis of the "faulty premises" upon which the Government predicates its argument that the contract awarded to Indian Construction was authorized by subsection 15 of Section 252, *supra*:

> . . . *First*, the proposition must be accepted that 25 U.S.C., Sec. 47 embraces roadway construction contracts, which it doesn't. *Second*, the proposition must be accepted that the language of the statute which states, "this section shall not be construed . . . to permit any contract for the construction or repair of . . . roads . . . to be negotiated without advertising as required by section 253 of this title . . .", really just doesn't mean what it says, and apparently, just dosen't mean anything at all. *Third*, the proposition must be accepted that the proviso within the exception which specifically excludes paragraph (1)-(3), (10)-(12), or (14) or 252(c), but *omits* to exclude paragraph (15) is likewise without significance and can be disregarded.
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> **[Brief of Appellee, p. 11]**

There is nothing in the language of the Buy-Indian Act or its legislative history which suggests that it was intended to apply to roadway construction projects. As if anticipating the "roadblock" created thereby, the Government attempts to gain a legal "foothold" by relating that the solicitor of the Department of the Interior rendered an opinion on April 27, 1971, entitled "Negotiability of Construction Contracts under the 'Buy-Indian' Act of June 25, 1910" which confirmed the administrative interpretation of the Act going back to about 1961. This opinion concluded that the enumerated exceptions in 41 U.S.C.A. § 252(c) and (e) were not intended to preclude dispensing with public advertising under the authority of the Buy-Indian Act. The Government states that the District Court failed to give any deference to the Department of the Interior's "long-standing" construction of the Buy-Indian Act. Our response is that if the Government's administrative interpretation is entitled to the deference urged, the Congress is the branch before whom the point should be pressed. We have heretofore stated that this Court shall not, under its classical adjudicative power, undertake to legislate. In conjunction therewith, we have held that statutes are to be construed in a manner so as to effectuate the intent of the enacting body, and that an unambiguous statute must be given its plain and obvious meaning. United States v. Ray, 488 F.2d 15 (10th Cir. 1973); United States v. Western Pacific Railroad Company, 385 F.2d 161 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

When the Congress was dealing with the Federal Property and Administrative Services Act of 1949, 41 U.S.C.A. §§ 252 and 253, it was deemed to be fully cognizant of the Buy-Indian Act of 1910. The Congress was, accordingly, capable of clearly and directly providing the interpretation of the Buy-Indian Act here urged by the Government. The fact is that it did not elect to do so. This Court cannot "fill the gap" by engaging in judicial law-making. Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972); McCord v. Dixie Aviation Corporation, 450 F.2d 1129 (10th Cir. 1971). In our view, we are here dealing with a political question beyond the judisdiction of the courts. Baker v. Carr, 369 U.S. 186 (1962).

A statute must be construed as it was intended to be understood when enacted in the light of conditions as they then existed. United States v. Stewart, 311 U.S. 60 (1940). Assuming, *arguendo*, the truth of the Government's contention that there were no Indian owned companies engaging in roadway construction in 1910 when the Buy-Indian Act was passed, still we observe that this contention is not advanced in relation to 1949 when the Federal Property Act was passed. In any event, we do not place particular weight on this matter.

Words of a statute are to be interpreted in their ordinary definitions and in the meanings commonly attributed to them. Jones v. Liberty Glass Company, 332 U.S. 524 (1947). Even where there are two statutes on the same subject, the earlier being *special*

and the later being *general* the special act controls as effective and all matters coming within the scope of the special statute are governed by its provisions. Preiser v. Rodriguez, 411 U.S. 475 (1973); Missouri K & T Ry. Co. v. Jackson, 174 F.2d 297 (10th Cir. 1949); Sutherland, Statutory Construction, 4th Ed., Vol. 2A, § 51.05. In Sutherland, *supra*, the rule is stated:

> General and special acts may be in pari materia. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. In the language of a court: "It is the general rule that where the general statute standing alone would include the same matter as the specific act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one; and where the general act is later the special statute will be considered as remaining an exception to its terms unless it is repealed in general words or by necessary implication." (Footnotes omitted.)

Government vigorously contends that its interpretive preference, which led to the grant of the non-

competitive award of the roadway construction project to Indian Construction is based upon the *remedial* aspects of the Buy-Indian Act, to-wit: Furtherance of a ". . . longstanding and important component of the Government's Indian policy designed to enable Indians to obtain jobs without having to compete on equal terms with non-Indians." [Brief of Appellants, p. 9.] We recognize that the remedial Buy-Indian Act is to be given a liberal construction in order to effectuate the purpose for which it was enacted. Sutherland, Statutory Construction, 4th Ed., Vol. 3, § 60.01. Even so, we believe that it strains the most liberal interpretation to conclude that the Act's preference for purchase of "Indian supplies" and "products" applies to a roadway reconstruction project whose contract price, through Indian Construction, is $1,219,481.00. The strain is the more "painful" when we consider that the Government engineer's estimate for the project was $963,117.48 and that Glover completed the first five miles of the reconstruction project, under normal competitive bidding procedures, for $538,000.00. While we do not represent or pretend that these comparative figures control in determining the reasonableness of the Indian Construction non-competitive contract price of $1,219,481.00, we do observe that a primary, significant *remedial* feature of the advertisement and competitive bidding requirements of the Federal Property and Administrative Services Act of 1949 is to obtain the best and lowest bid for the benefit of the American taxpayers in "high cost" construction

categories. In that sense we observe that this Court has held that a statutory exception should be strictly construed so that the exception does not devour the general policy which the law embodies. Edward B. Marks Music Corp. v. Colorado Mag., Inc., 497 F.2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975).

WE AFFIRM.

McKAY, Circuit Judge, dissenting:

By rigidly adhering to formalistic rules of statutory construction, today's opinion reaches a result hostile to the remedial purposes of the Buy Indian Act. Inasmuch as the relevant rules of statutory construction could be applied in a reasonable manner to reach a result more in keeping with national policy priorities, I am compelled to dissent.[1]

The real issue in this case is the extent to which the Buy Indian Act, 25 U.S.C. § 47 (1976), retains vitality in light of the advertising requirements of the Federal Property Act, 41 U.S.C. §§ 252, 253 (1976). In order to understand the tension between the provisions, it will be helpful to consider the purposes, history and applications of the Buy Indian Act.

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[1] In addition to dissenting from the majority's decision on the merits, I take exception to the statement that this case involves a political question over which we have no jurisdiction. The "political question" doctrine holds as nonjusticiable under the separation of powers concept cases involving matters which have been committed by the Constitution to another branch of government. Baker v. Carr, 369 U.S. 186, 210 (1962). These cases typically involve such matters as foreign relations, procedures for ratifying constitutional amendments, and the republican form of government guaranty. 369 U.S. at 211, 214, 218. The suggestion that the instant case involves a political question would appear to be novel. It certainly is not supported by *Baker* v. *Carr*, cited by the majority, in which the Supreme Court found the issue under consideration there not to be a political question. In any event, to the extent this case is said to involve a *policy* question, it is sufficient to observe that Congress has already decided it in favor of Indians by enacting the Buy Indian Act.

The Buy Indian Act announces a congressionally approved policy of preferring Indian labor and products and grants the Interior Secretary discretionary power to purchase Indian products in the open market. Pursuant to this authority, the Secretary has authorized the negotiation of contracts with Indians to the exclusion of non-Indians. 41 C.F.R. § 14H-3.215.70 (1977). One result has been the development of a program under which the Interior Department has awarded millions of dollars in road construction contracts to Indian contractors. This program has provided substantial economic encouragement to Indian construction enterprises. The program is emasculated by today's opinion.

The obvious purpose of the Buy Indian Act is to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements. Its laudable goal is furthering the economic progress of a disadvantaged people. While the legislative history of the Buy Indian Act is rather scanty, it nonetheless manifests a clear purpose to except purchases of Indian products from advertising requirements. In 1910 changes were made in the legislation containing the earliest version of the language now preserved in the Act. Some of the legislative commentary on the proposed changes demonstrates the purpose of the Buy Indian Act itself.

In relevant part, the language of the 1910 proposed amendment reads as follows:

> That hereafter the purchase of Indian supplies shall be made in conformity with the [advertising] requirements of section 3709 of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed and purchases of the products of Indian industry may be made in open market, in the discretion of the Secretary of the Interior. All acts and parts of acts in conflict with the provisions of this section are hereby repealed.

H.R. 24992, 61st Cong., 2d Sess. § 28 (1910), 45 Cong. Rec. 6097 (1910). This section of the bill was virtually identical to the version ultimately enacted. Act of June 25, 1910, Pub. L. No. 313, § 23, 36 Stat. 861 (1910).

Prior to the passage of the amendment, the House Committee on Indian Affairs commented on its purpose and compared it to the version being amended:

> The purpose of this section is patent from the text. If this section shall be enacted into law it will repeal the following portion of the act of April 30, 1908 (35 Stat., 71):
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> > [Indian appropriation act, April 30, 1908 (35 Stat., 71).]
> >
> > That no purchase of supplies for which appropriations are herein or hereinafter made for the Indian service, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of

the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided*, That hereafter supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, not to exceed the sum of five thousand dollars in any one purchase or contract, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further*, That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the direction of the Secretary of the Interior.

With the exceptions noted in the proviso, it will bring the Indian Service, like all other branches of the public service, under the provisions of section 3709 of the Revised Statutes of the United States, which reads as follows:

> [Section 3709, Revised Statute.]
>
> Sec. 3709. All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the place and in the manner in which such articles are usually bought and sold, or such services engaged between individuals.

H. R. Rep. No. 1135, 61st Cong., 2d Sess. 12 (1910) (bracketed material in original). The "exceptions noted in the proviso" constituted the substance of the Buy Indian Act as it now appears. The significance of the proviso is apparent: It excepted Indian products from the strictures of the advertising statute then in effect.[2]

The perpetuation of the proviso's language into the present era indicates that the purpose is still of significance. In light of the Act's legislative history and for the policy reasons underlying the Act itself, purchases of Indian products should be governed by that Act and should not be subject to standard advertising requirements not made explicitly applicable to otherwise exempted Indian products.

Despite the message of the legislative history, and despite the remedial purposes of the Act, the majority concludes that the Interior Department's road con-

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[2] In this regard, it is noteworthy that this particular amendment was motivated, at least in part, by an intention to prevent abuses in the purchase of supplies for Indians. It seems that many purchases had been accomplished by skirting the advertising requirements then in effect. While the amendment sought to strengthen generally the advertising requirement, an exception was expressly included for purchases of Indian products. 45 Cong. Rec. 6097 (1910) (remarks of Rep. Burke).

struction program is illegal. It makes this conclusion by determining that there is no conflict between the Buy Indian Act and the Federal Property Act's advertising requirements. This determination depends, in turn, on the majority's view that because nothing in the language of the Act or in its legislative history indicates it was intended to apply to road construction projects, the term "products of Indian industry" does not include Indian built roads. Implicit in this conclusion is the troubling notion that because a particular economic activity is not mentioned in the Act or in its legislative history, that activity is not covered. Such a construction may make the Act applicable to nothing at all.[3]

Alternatively, the majority may be suggesting that only those Indian activities conducted in 1910 are covered by the Act.[4] The record does not inform us whether Indian road construction enterprises existed in that year.[5] Regardless of this latter fact, the

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[3] Congress often casts "statutory provisions in general terms, leaving to the agency the task of spelling out the specific regulations and programs." Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 703 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974).

[4] The opinion contends that the Interior Department's longstanding interpretation of the Act is not persuasive because that interpretation was not articulated in 1910.

[5] Legislative history does indicate that Indians participated in reservation road construction projects during this period. *See* Letter from James Rudolph Garfield, Secretary of the Interior, to Senator Moses E. Clapp (Feb. 19, 1908), *reprinted in* S. Rep. No. 278, 60th Cong., 1st Sess. 18-19 (1908).

thrust of this rationale would have the effect of restricting the Act's application to activities of a 1910 vintage—which is hardly a reasonable way to encourage significant economic development in a modern market context.[6] There is no indication Congress intended the preferential treatment to be limited to economic activities Indians were involved in at the time of enactment. Indeed, the Act's very purpose is to encourage Indian economic enterprises that would suffer in a competitive context. The view of the Act expressed in today's opinion threatens to relegate it to a role of protecting Indian handicraft and trinket production—economic activities that probably require no preferential treatment at all.

Today's opinion ignores the Supreme Court's clear instructions on statutory construction where Indians are involved. Writing for a unanimous Court in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), Mr. Justice Brennan characterized as an "eminently sound and vital canon" the proposition that "statutes passed for the benefit of [Indians] are to be liberally construed, doubtful expressions being resolved in favor of the Indians." 426 U.S. at 392. It seems to me that we have done just the opposite in this case. I am perplexed by the court's unwillingness to apply

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[6] The majority's concern about noncontemporaneous interpretations of the Act fails to consider the often unavoidable generality of statutory language. See note 3, *supra*. It also begs the more pertinent question whether the Act as passed in 1910 gave he Secretary authority to negotiate contracts for all varieties of Indian products—beads or roads. I believe the Act could have no other reasonable meaning.

the label "product of Indian industry" to highways produced by Indian companies. I am certain the majority would have had little difficulty determining that Indian blankets and beads are products of Indian industry. Indeed, counsel for Glover Construction admitted in oral argument that a multimillion dollar computer would be an Indian product if it were manufactured by an Indian company. I fail to see why an Indian built road is not an Indian product. I simply do not understand why we decline to apply the meaning of the word "product" in a way that actually does some good.[7]

My view of the Buy Indian Act does result in apparent conflict between it and the advertising requirements of the Federal Property Act. If this conflict is to result in a resolution that applies the advertising provisions to Indian roadway construction contracts, then to this extent the Buy Indian Act will have been repealed by implication. It seems to me that a much more sensible outcome could be obtained. An example of such an outcome appears

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[7] In Great Western Broadcasting Corp. v. N.L.R.B., 310 F.2d 591, 595 (9th Cir. 1962), the following definition of "product" was given: "In its broadest sense, the term 'product' denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise permits, to refer to a completed service as a 'product.'" The context of the instant statutory provision permits a broad definition to be employed. If pure services are thought to be includable within the definition, so ought to be activities such as road building which, though labor intensive, result in a tangible product.

in the Supreme Court's opinion in *Morton* v. *Mancari*, 417 U.S. 535 (1974).

The *Morton* v. *Mancari* case presented the question whether the Indian employment preference provision of the Indian Reorganization Act, 25 U.S.C. § 472, was impliedly repealed by Section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(a). This section of the Employment Act requires federal agencies to make personnel actions without regard to race, color, religion, sex or national origin. Thus a conflict was presented between the Indian Reorganization Act's preferential mandate and the Employment Act's proscriptions against discrimination. After examining the history and purpose of Indian preference statutes (including the one under consideration here), the Court said that in the absence of an affirmative showing of an intention to repeal, the only justification for a repeal by implication is that the statutes are irreconcilable. The Court found that the statutes were not. It concluded that a provision aimed at furthering Indian self-government by granting employment preference to Indians for positions in the Bureau of Indian Affairs can readily co-exist with a general proscription against employment discrimination. "Any other conclusion," said the Court, "can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians." 417 U.S. at 550. The Court went on to observe that the preference statute applied to a very specific situation, while the Employment Act

provision applied to Federal employment generally. In upholding the preference statute, the Court noted that a specific statute will not be controlled by a more general one.

Essentially the same considerations apply to the case before this Court. Once again, an Indian preference statute is involved.[8] Neither the language nor the legislative history of the Federal Property Act indicates an intent to repeal or modify the Buy Indian Act. The Act applies in limited circumstances only; the relevant Federal Property Act provisions apply to general Federal procurement of construction contracts.[9] Like the employment preference in *Mancari*, the Buy Indian Act arises from the unique legal relationship between Indians and the Federal Government. As the *Mancari* preference was designed to promote Indian self-government, the preference here is designed to promote Indian economic development and self-sufficiency. And, as the preference statute in *Mancari* could co-exist with a general policy of non-discrimination in government employment, the Buy Indian Act's authorization of the negotiation of road construction contracts with Indian firms can co-exist with a broad rule requiring public advertising for bids on Government construction contracts.

[8] The *Mancari* Court listed the Buy Indian Act among the preference statutes similar to the one under consideration in that case. 417 U.S. at 538 n.2, 541 n.8.

[9] The majority's argument about specific statutory provisions controlling general ones is, in this sense, supportive of a result opposite to that reached in its opinion.

This result is consistent with the following admonition from *Mancari*:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

417 U.S. at 551. Given the Supreme Court's admonition, our decision in this case should be to sustain both statutory provisions in a way that vitiates neither.[10]

I would reverse.

[10] Even if the majority's general perception of the dominance of the advertising provisions were correct, there would still be a problem with the remedy in this case. An injunction has been upheld, and upheld in the face of substantial work on the construction project. It seems to me that this remedy prevents the Secretary from exercising his discretion in a way that might still except this contract from the advertising requirements. The policy of the Buy Indian Act is to encourage Indian economic development by shielding Indian economic enterprises from the full rigors of market pressure. It is obvious that this policy purpose would be frustrated by an imposition of market pressures in the form of advertised bidding. In light of the purpose of the Buy Indian Act, advertised bidding with its inherent competitiveness may be within the "impracticability" exception to the advertising requirements of 41 U.S.C. § 252(c), (e) (1976). *See* Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 708 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974) (holding competition "impractical" where as cross-purposes with the Small Business Act). At the very least, this case should be remanded with instructions allowing the Secretary to determine whether that exception applies. I believe the exception might well apply as a matter of law.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM—January 11, 1979

Before Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable Monroe G. McKay, Circuit Judges.

GLOVER CONSTRUCTION COMPANY,
PLAINTIFF-APPELLEE,

vs.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF INTERIOR; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, and A. E. GREEN, DEFENDANT-APPELLANTS.

JUDGMENT

No. 78-1554

(D.C. No. 78-178-C)

This cause came on to be heard on the record on appeal from the United States Court for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. Judge McKay, Circuit Judge, dissents.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

APPENDIX C

MARCH TERM—March 12, 1979

Before Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Circuit Judges.

No. 78-1554

GLOVER CONSTRUCTION COMPANY,
PLAINTIFF-APPELLEE,

vs.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF INTERIOR; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, and A. E. GREEN, DEFENDANT-APPELLANTS.

This matter comes on for consideration of appellants' motion for leave to file petition for rehearing out of time and the appellants' petition for rehearing.

Upon consideration whereof, it is ordered as follows:

1. Appellants' petition for rehearing is ordered filed as of March 2, 1979.

2. The petition for rehearing is denied on the merits. Judge McKay voted to grant rehearing.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

APPENDIX D

GLOVER CONSTRUCTION COMANY, PLAINTIFF,

v.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF INTERIOR, *et al.*, DEFENDANTS.

No. 77-178-C

UNITED STATES DISTRICT COURT,
E. D. OKLAHOMA

March 29, 1978

On Motion for Clarification May 12, 1978

ORDER GRANTING SUMMARY JUDGMENT

MORRIS, Chief Judge.

This action is before the court on motions for summary judgment filed by the plainitff and the defendants. The parties have filed briefs setting forth their respective positions in connection with these motions.

Plaintiff contends that it is entitled to summary judgment on its claim that the policy of the Bureau of Indian Affairs (BIA) of entering into contractual negotiations with wholly Indian owned companies regarding road construction without complying with the advertising requirements of 41 U.S.C. § 5 and 41 U.S.C. § 253 denies plaintiff equal protection of the laws and due process of law. In this connection plaintiff asserts that the BIA, in 1976 began implementing

a new interpretation of the "Buy Indian Act," 25 U.S.C. § 47, which act has been in effect since 1910. Plaintiff points to an interdepartmental memorandum, 20 BIAM Bulletin 1, March 3, 1976 (Exhibit D to defendants' brief) providing that negotiations are to be conducted with Indian contractors and that non-Indian contractors are to be contacted only after it has been determined that there are no qualified Indian contractors within the normal competitive area. Plaintiff contends that the Buy Indian Act does not authorize contract negotations for the construction of roads and that such a procurement must be obtained in accordance with the requirements set out in 41 U.S.C. §§ 5 and 253.

Defendants claim that they have consistently followed the policy set out in the bulletin and that the Buy Indian Act falls within the "otherwise authorized by law" exception to advertising under 41 U.S.C. § 252(c)(15). *See* Exhibit J to defendants' brief. In response to the latter contention plaintiff states that 41 U.S.C. § 252(e) fails to exempt contracts for the construction of roads from the advertising requirements, since it expressly exempts 41 U.S.C. § 252(c)(1)-(3), (10)-(12), and (14) but does not refer to subsection (15). Thus, plaintiff argues, subsection (15) is not excluded from the provisions of 41 U.S.C. § 253 under the maxim "expressio unius est exclusio alterius."

25 U.S.C. § 47 provides:

> So far as may be practicable Indian labor shall be employed, and purchases of the products

of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

Section 47 was codified from the Act of June 25, 1910, ch. 431, § 23, 36 Stat. 861 which provides in its entirety as follows:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed.

Since title 25 of the United States Code is not among the titles of the United States Code which have been enacted into law, *see* Preface to 1976 Edition of the United States Code, reference to the Statutes at Large is proper. Section 3709 of the Revised Statutes has been codified as 41 U.S.C. § 5.

41 U.S.C. § 252 provides in pertinent part:

> (a) Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this chapter and implementing regulations of the Administrator; but this chapter does not apply—
>
> (1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or
>
> (2) when this chapter is made inapplicable pursuant to section 474 of Title 40 or any other

> law, but when this chapter is made inapplicable by any such provision of law sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5.
>
> . . . .
>
> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> . . . .
>
> (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.
>
> . . . .
>
> (e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of this section.

41 U.S.C. § 253(a) provides:

> Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

41 U.S.C. § 5 provides:

Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $10,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Except (1) as authorized by section 1638 of Appendix to Title 50, (2) when otherwise authorized by law, or (3) when the reasonable value involved in any one case does not exceed $500, sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising.

In the case of wholly owned Government corporations, this section shall apply to their administrative transactions only.

41 U.S.C. § 260 provides:

Sections 5, 8 and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this chapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this chapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title.

The parties agree that 41 U.S.C. §§ 252 and 253 apply to the BIA. Since Section 252 does so apply it appears that 41 U.S.C. § 5 does not apply in this case. See 41 U.S.C. §§ 252(a)(1) & (2), 260.

The material facts are not in dispute in this case. On May 25, 1977, the BIA entered into a road construction contract with the Indian Nations Construction Company. The BIA had invited three Indian owned companies to bid for the contract, but only the company contracted with submitted a bid. The bidding was restricted to Indian owned firms and no attempt was made to comply with the advertising provisions of 41 U.S.C. § 253. Plaintiff was not afforded an opportunity to bid.

Purchases of property and services for the United States are governed by the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377. As indicated previously, there is no dispute that 41 U.S.C. §§ 252 and 253, which are sections 302 and 303 of the Act, see 63 Stat. 393-95, apply to the BIA. The court will accordingly turn to the question whether the procedure followed by the BIA in awarding the road construction contract involved in this case contravenes the requirements set out in 41 U.S.C. §§ 252 and 253.

Section 252(c) makes all purchases and contracts for property and services *subject to the advertising requirements* of section 253 *unless* they come within any of the fifteen enumerated exceptions. Defendants contend that the Buy Indian Act comes within subsection (15). There is no contention that any of the other fourteen exceptions apply in this case. Subsection (e)(B) specifically provides that section 252 shall *not* be construed to permit any contract for the construction of roads to be negotiated *without advertising* as required by section 253 unless the contract is to be performed outside the continental United States or *unless* negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-12), or (14) of subsection (c).

Defendants' argument that subsection (e) is an admonition rather than a prohibition and that subsection (c)(15) authorizes negotiation of road construction contracts under the Buy Indian Act is unpersuasive. Congress saw fit to specifically exempt

seven subsections of section 252(c) from the advertising requirements with respect to road construction contracts and did *not* include the "otherwise authorized by law" provision of subsection (c)(15) within this category. This is the subsection on which defendants rely.

The effect of the enumeration of express exceptions in a statute has been stated as follows:

> The specification by the legislature of exceptions to the operation of a general statute, does not necessarily operate to preclude the court from applying other exceptions. However, where express exceptions are made, the legal presumption is that the legislature *did not intend to save other cases from the operation of the statute.* Thus, the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made. Under this principle, where a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication. (Emphasis added.)

73 Am.Jur.2d *Statutes* § 316 (1974) (footnotes omitted). The court accordingly concludes that contracts for the construction of roads, such as the contract involved in the instant action, are *not* excepted from the advertising requirements of section 253 by virtue of section 252(c)(15).

Defendants contend, however, that the Buy Indian Act has been interpreted for many years as authoriz-

ing construction contracting with invitations to bid restricted to Indian contractors, and that this administrative construction of the statute is entitled to great weight. Plaintiff contends that 20 BIAM Bulletin 1 of March 3, 1976 (Exhibit D to defendants' brief) represents a new policy, and even if not new, that the statutory interpretation therein espoused is entitled to little or no weight since it is not a contemporaneous statutory construction.

Defendants' exhibits establish at best that the interpretation set forth in the 1976 bulletin may date back as far as 1961. Assuming this to be true for the purpose of plaintiff's summary judgment motion it does not follow that such interpretation is entitled to be given great weight, or any weight, upon the question of the proper statutory interpretation.

Defendants rely on *Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965), and *United States* v. *Jackson*, 280 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361 (1930) for the general rule of statutory construction that "great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration." 280 U.S. at 193, 50 S.Ct. at 146. The Court emphasized in *Udall*, however, that the Secretary had consistently construed the executive order and public land order there involved since their promulgation and that this interpretation had been made a repeated matter of public record. 380 U.S. at 4, 17, 85 S.Ct. at 801. Furthermore, the Supreme Court has recognized that

> [i]t has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. See e.g. *Logan* v. *Davis*, 233 U.S. 613, 627 [34 S.Ct. 685, 5 L.Ed. 1121]. But the court is not bound by a construction so established. *Chicago &c. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U.S. 97, 99 [40 S. Ct. 504, 64 L.Ed. 801]. *United States* v. *Dickson*, 15 Pet. 141, 161 [10 L.Ed. 689]. *The rule does not apply in cases where the construction is not doubtful.* And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States*, 113 U.S. 568, 571 [5 S.Ct. 648, 28 L.Ed. 1079]. *Merritt* v. *Cameron*, 137 U.S. 542, 551 552 [11 S.Ct. 174, 34 L.Ed. 772]. *United States* v. *Alabama Railroad Co.*, 142 U.S. 615, 621 [12 S.Ct. 306, 35 L.Ed. 1134]. *United States* v. *Healey*, 160 U.S. 136, 145 [16 S.Ct. 247, 40 L.Ed. 369]. *Studebaker* v. *Perry*, 184 U.S. 258, 268 [22 S.Ct. 463, 46 L.Ed. 528]. *Houghton* v. *Payne*, 194 U.S. 88, 99 [24 S.Ct. 590, 48 L.Ed. 888].

United States v. *Missouri Pacific R.R.*, 278 U.S. 269, 280, 49 S.Ct. 133, 137, 73 L.Ed. 322 (1929) (emphasis added). The Court has also said:

> True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not

be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U.S. 760, 763 [24 L.Ed. 588]; *Logan* v. *Davis*, 233 U.S. 613, 627 [34 S.Ct. 685, 58 L.Ed. 1121]; *Brewster* v. *Gage*, 280 U.S. 327, 336 [50 S.Ct. 115, 74 L.Ed. 457]; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375 [51 S.Ct. 144, 75 L.Ed. 397]; *Interstate Commerce Comm.* v. *N.Y., N. H. & H. R. Co.*, 287 U.S. 178 [53 S.Ct. 106, 77 L.Ed. 248]. The practice has peculiar weight when it involves a *contemporaneous* construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co.* v. *United States, supra.* (Emphasis added.)

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796 (1933). And, the Supreme Court further stated in *Missouri Pacific*:

> The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. *It is elementary that where no ambiguity exists there is no room for construction.* Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. . . . Construction may not be substituted for legislation. *United*

States v. *Wiltberger*, 5 Wheat. 76, 95-96 [5 L.Ed. 37]. *United States* v. *Fisher*, 2 Cranch 358, 386 [2 L.Ed. 304]. *Lake County* v. *Rollins*, 130 U.S. 662, 670 [9 S.Ct. 651, 32 L.Ed. 1060]. *Caminetti* v. *United States*, 242 U.S. 470 [37 S.Ct. 192, 61 L.Ed. 442]. *Ex parte Public National Bank, ante*, p. 101 [278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202]. *United States* v. *Colorado & N. W. R. Co.*, 157 F. 321, 327.

> . . . Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. *United States* v. *Freight Ass'n* 166 U.S. 290, 325 [17 S.Ct. 540, 41 L.Ed. 1007]. *Pennsylvania R. R.* v. *Internaitonal Coal Co.*, 230 U.S. 184, 199 [33 S.Ct. 893, 57 L.Ed. 1446]. *Mackenzie* v. *Hare*, 239 U.S. 299, 308 [36 S.Ct. 106, 60 L.Ed. 297]. *Caminetti* v. *United States, supra*, 490 [of 242 U.S. (37 S.Ct. 192)].

278 U.S. at 277-78, 49 S.Ct. at 136. (emphasis added).

The court is of the view that construction of section 252(c) and (e) is not doubtful and that the rule of

deference by the court to an administrative interpretation has therefore no application in this case. Moreover, even if the rule were applicable, defendants have not shown or even contended that the policy challenged in this action has been in effect prior to 1961. The Buy Indian Act has been in effect since 1910 and 41 U.S.C. §§ 252 and 253 have been in effect since 1949. There is accordingly no contemporaneous interpretation involved in this case. It was held in *United States* v. *Manzi*, 16 F.2d 884 (1st Cir. 1926) that a construction not adopted by the department until after a statute had been in operation for fourteen years was entitled to little or no weight upon the question of the proper interpretation of the statute. *See also Citizen Band of Potawatomie Indians of Oklahoma* v. *United States*, 391 F.2d 614, 621, 179 Ct.Cl. 473 (1967), *cert. denied*, 389 U.S. 1046, 88 S.Ct. 771, 19 L.Ed.2d 839 (1968).

For all of the foregoing reasons and on the basis of the authorities heretofore discussed the court concludes that defendants' procedure in connection with awarding the road construction contract involved in this case contravenes the advertising requirements of 41 U.S.C. §§ 252 and 253. Summary judgment is accordingly granted in favor of the plaintiff and against the defendants. Defendants' cross-motion for summary judgment is denied.

In view of the court's conclusion that defendants' procedure in restricting bids with respect to road construction contracts to Indian owned companies contravenes 41 U.S.C. §§ 252 and 253, it is unnecessary to reach plaintiff's alternative constitutional arguments.

Defendants are hereby enjoined from continuing to circumvent the advertising requirements of 41 U.S.C. § 253 in connection with the road construction contract awarded to Indian Nations Construction Company. Defendants are permanently enjoined from circumventing the advertising requirements of section 253 with respect to any future contracts for the construction of roads.

Plaintiff and defendants are directed to file within ten days from the date of this order a joint status report indicating whether road construction work has been commenced pursuant to the contract between defendants and Indian Nations Construction Company, and if so, the percentage of completion of the construction work under the contract. If the parties cannot agree on a joint status report each side will file such a report within the same ten day period.

Plaintiff is directed to file within ten days from the date of this order a brief setting forth the appropriate relief to be granted in this case by way of final judgment in accordance with the views expressed in this order and on the basis of the status of the construction work under the contract challenged in this action. Defendants will have ten days thereafter to file a response brief. The court is particularly concerned with the question of the appropriate equitable relief to be granted with respect to the unperformed balance, if any, of the construction contract in ques-

tion and invites the parties to specifically address this issue in their briefs.

ON MOTION FOR CLARIFICATION

In its order entered March 29, 1978, granting summary judgment in favor of the plaintiff and against the defendants, the court directed the parties to file briefs regarding the appropriate relief to be granted in this case by way of final judgment. The parties have filed such briefs. In addition, defendants have filed a motion for clarification, which motion is accompanied by a brief in support thereof.

Defendants seek clarification of the March 29, 1978 order with respect to the scope of the injunction issued and whether it is a preliminary or permanent injunction. Defendants request separate findings of fact and conclusions of law pursuant to Rule 52(a) Fed.R.Civ.P., and a description in reasonable detail of the acts sought to be restrained pursuant to Rule 65(d) Fed.R.Civ.P.

With respect to the proper relief to be granted in this case, plaintiff requests the court (1) to cancel the construction contract and have the unperformed balance submitted for competitive bidding; (2) to order Indian Nations Construction Company to refund all monies heretofore paid under the contract; and (3) to award plaintiff its costs and attorneys' fees incurred in this action.

Defendants admit that to declare the contract null and void constitutes a reasonable relief in this case

in light of the summary judgment order, but they contend that it would not be proper for the court to order refund of monies paid by the defendants to Indian Nations for work heretofore performed under the contract and to permit plaintiff to recover attorneys' fees.

Defendants' status report reflects that 9.7 percent of the construction contract had been completed when the United States issued a stop order on March 31, 1978. Defendants state that Indian Nations has been paid only for work actually performed and that no money has been advanced to it for anticipated performance.

"Where performance has been entered upon under an illegal bargain the general rule is that the court will leave the parties to the illegal bargain as it finds them." J. Calamarie & J. Perillo, *The Law of Contracts* 567 (1970) (footnote omitted). However, in some instances quasi contractual recovery has been allowed in cases where there has been some performance under an illegal contract. *Id.* at 573.

The court hereby declares the road construction contract entered into between defendants and Indian Nations as null and void. *Schoenbrod* v. *United States*, 410 F.2d 400, 187 Ct.Cl. 627 (1969); J. Calamarie & J. Perillo, *The Law of Contracts* § 376 (1970). However, no refund is to be made of any sums heretofore paid under the contract. Even if the court could order a refund, which is doubtful since Indian Nations is not a party to this action, the court finds that it would be inequitable to require a refund

of monies earned by Indian Nations for work performed in reliance upon and pursuant to the contract. *Cf. Prestex, Inc.* v. *United States*, 320 F.2d 367, 373, 162 Ct.Cl. 620, 626 (1963).

Plaintiff's request that the court order defendants to advertise the unperformed balance of the road construction contract is denied for the reason that it would constitute an improper interference with the executive branch. Defendants as members "of the executive branch of the United States . . . are not subject to supervision or direction by the courts as to how they shall perform the duties imposed by law upon them." *Giancana* v. *Hoover*, 322 F.2d 789, 790 (7th Cir. 1963). *See In re Daley*, 549 F.2d 469, 480 n. 11 (7th Cir. 1977), *cert. denied*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1978).

Regarding plaintiff's request for costs and attorneys' fees the court notes initially that plaintiff will be free to file its bill of costs with the court clerk within the time limits prescribed by Local Rule 6 and in accordance with Rule 54(d) Fed.R.Civ.P. and 28 U.S.C. §§ 1920 and 2412. The taxability of costs is therefore not properly before the court at this time.

Turning to plaintiff's request for attorneys' fees the court notes that 28 U.S.C. § 2412 provides:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title *but not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States. (Emphasis added.)

"The principle of sovereign immunity precludes the award of costs and fees against the United States 'in the absence of a statute directly authorizing it . . . .'" *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 168 U.S. App.D.C. 111, 113, 512 F.2d 1351, 1353 (1975). *See Parker* v. *Califano*, 182 U.S. App.D.C. 322, 327, 561 F.2d 320, 325, n. 15 (1977). Plaintiff has not cited any statute expressly authorizing attorneys' fees in a case of this type and the court is not aware of any such statute. Plaintiff instead relies on two equitable exceptions to the American rule pursuant to which attorneys' fees cannot be awarded to the successful litigant as a matter of course, *see* Note, 11 Tulsa L.J. 420 (1976), namely, the common fund doctrine and the private attorney general theory. The court is of the view that recovery of attorneys' fees cannot be had against the United States under the equitable exceptions to the American rule in light of the express prohibition contained in 28 U.S.C. § 2412. *Natural Resources Defense Council, Inc.* v. *Environmental*

Protection Agency, 168 U.S.App.D.C. 111, 113, 512 F.2d 1351, 1353 (1975). *See Parker* v. *Califano*, 182 U.S.App.D.C. 322, 327, 561 F.2d 320, 325 n. 15 (1977). Plaintiff has not cited any statute expressly authorizing attorneys' fees in a case of this type and the court is not aware of any such statute. Plaintiff instead relies on two equitable exceptions to the American rule pursuant to which attorneys' fees cannot be awarded to the successful litigant as a matter of course, *see* Note, 11 Tulsa L.J. 420 (1976), namely, the common fund doctrine and the private attorney general theory. The court is of the view that recovery of attorneys' fees cannot be had against the United States under the equitable exceptions to the American rule in light of the express prohibition contained in 28 U.S.C. § 2412. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 168 U.S.App.D.C. 111, 113, 512 F.2d 1351, 1353 (1975). However, even if these equitable doctrines could furnish a basis for an award of attorneys' fees against the United States, the court must nevertheless conclude that plaintiff could not recover in this case under either the common fund doctrine or the private attorney general theory.

Although the common fund doctrine has been expanded considerably by recent Supreme Court decisions, *Hall* v. *Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), it requires that

those benefited by the litigation be an ascertainable class. *See* Note, 11 Tulsa L.J. 420, 424-25, 428 n. 56 (1976). " 'It is necessary to determine . . . that it is plaintiffs effort which caused others to benefit.' " 6 J. Moore, *Federal Practice* Par. 54.77[2], at 1708 (2d ed. 1976) (footnote omitted). Plaintiff has not made the requisite showing here upon which the court could base such a determination.

Plaintiff cites several cases in support of its claim for attorneys' fees pursuant to the private attorney general theory, but fails to mention *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) in which the Supreme Court dealt a death blow to the private attorney general theory. *See* Note, *Alyeska Pipeline Service Co.* v. *Wilderness Society: The Demise of the Private Attorney General Theory as a Basis for Awarding Attorneys' Fees in Public Interest Litigation*, 11 Tulsa L.J. 420 (1976). That theory is therefore no longer a viable exception to the American rule except as it has been revived in the areas of civil rights and taxation with the passage of the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. No. 94-559, 90 Stat. 2641, codified in 42 U.S.C. § 1988.

In a supplemental brief filed on May 10, 1978, plaintiff concedes that *Alyeska* repudiated the private attorney general theory. Plaintiffs points out, however, that *Alyeska* specifically recognizes the common fund doctrine and plaintiff contends that it is entitled to its attorneys' fees pursuant to a reimbursement plan similar to the one suggested by the Court of

Appeals for the District of Columbia Circuit in *National Treasury Employees Union* v. *Nixon*, 172 U.S. App.D.C. 217, 521 F.2d 317 (1975). The court notes however, that the government in that case was said to have conceded that 28 U.S.C. § 2412 was not directly applicable because the request for attorneys' fees was based on reimbursement from employees benefited by pay adjustments on account of plaintiff's suit and not on reimbursement from the public treasury. *Id.* at 219, 521 F.2d at 319.

Defendants in the instant case cannot be said to have made such a concession. Furthermore, the court cannot ascertain in this case the class which plaintiff claims it has benefited as the court was able to with respect to the federal employees who were entitled to a pay raise in *Nixon*. The court would have to engage in speculation in this case in order to ascertain which contractors might have been or would be awarded which road construction contract. The *Nixon* case is therefore not controlling here. Moreover, the District of Columbia Circuit has held in two cases subsequent to *Nixon* that absent specific statutory authorization section 2412 bars recovery of attorneys' fees against the United States and that the common fund doctrine does not avoid the bar of section 2412 when an award of attorneys' fees would in effect have to be satisfied out of government funds. *Pealo* v. *Farmers Home Administration*, 183 U.S.App.D.C. 225, 562 F.2d 744 (1977); *National Council of Community Mental Health Centers, Inc.* v. *Mathews*, 178 U.S.App.D.C. 237, 546 F.2d 1003 (1976), *cert. denied*, 431 U.S. 954, 97 S.Ct. 2674, 53 L.Ed.2d 270 (1977).

The court accordingly concludes that 28 U.S.C. § 2412 bars an award of attorneys' fees in this case, and that even in the absence of such a statutory bar, plaintiff could not recover attorneys' fees either under the private attorney general theory or the common fund doctrine. Plaintiff's request for attorneys' fees is in all respects denied.

Defendants' motion for clarification is directed toward the following paragraph of the court's order of March 29, 1978 granting summary judgment:

> Defendants are hereby enjoined from continuing to circumvent the advertising requirements of 41 U.S.C. § 253 in connection with the road construction contract awarded to Indian Nations Construction Company. Defendants are permanently enjoined from circumventing the advertising requireuents of section 253 with respect to any future contracts for the construction of roads.

Defendants state that there is disagreement as to the meaning of the first sentence in light of the fact that no further advertising is anticipated in the road construction project and since it is not clear whether it constitutes a preliminary or a permanent injunction. Defendants suggest that the injunction relief ordered in the above paragraph is preliminary and request separate findings of fact and conclusions of law pursuant to Rule 52(a) Fed.R.Civ.P., and a description in reasonable detail of the acts sought to be restrained pursuant to Rule 65(d) Fed.R.Civ.P.

The injunctive relief is part of the final judgment entered this day and constitutes permanent injunctive

relief. Defendants are accordingly now in a position to file their notice of appeal. With respect to defendants' request for separate findings the court notes that Rule 52(a) provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. *Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).* (Emphasis added.)

This matter was before the court on motions for summary judgment by both plaintiff and the defendants under Rule 56. There has been full compliance with the rules.

The court is further convinced that the injunctive relief ordered satisfies the detail requirements of

Rule 65(d) and that its meaning is clear. By virtue of the injunctive relief granted in this case defendants are simply commanded to follow the proper procedure in awarding road construction contracts in conformity with the applicable statutes as interpreted in the court's order of March 29, 1978. Defendants are correct when they state that they are not subject to judicial supervision regarding the manner in which they are to perform their responsibilities and exercise their judgment and discretion as members of the executive branch of government. *In re Daley*, 549 F.2d 469, 480 n. 11 (7th Cir. 1977), *cert. denied*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1978). *Giancana* v. *Hoover*, 322 F.2d 789 (7th Cir. 1963). Obviously, the permanent injunction issued in this case does not in any manner, whatsoever, impinge upon such executive department functions of the defendants, but merely enjoins them from violating applicable statutory provisions, if and when they decide to enter into road construction contracts.

ORDERED this 12th day of May, 1978.

FINAL JUDGMENT

In conformity with the court's orders entered in this action on March 29, 1978 and on this date, it is hereby ordered, adjudged and decreed

(1) that the road construction contract entered into between defendants and Indian Nations Construction Company is null and void;

(2) that no refund is to be made of any sums heretofore paid under the contract to Indian Nations Construction Company;

(3) that defendants are permanently enjoined from circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future road construction contracts.

ORDERED this 12th day of May, 1978.

APPENDIX E

[SEAL]

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Memorandum [APR. 27, 1971]

To: Commissioner of Indian Affairs

From: Solicitor

Subject: Negotiability of construction contract under the "Buy Indian" Act of June 25, 1910

Your memorandum of March 23, 1971, requested our opinion concerning the use of Section 23 of the Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. § 47, as authority to enter into negotiated construction contracts with Indians. 25 U.S.C. § 47 reads:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

We believe this will support negotiated construction contracts with Indians.

In considering the scope and applicability of that part of Section 23 of the Act of June 25, 1910 36 Stat. 861, codified as 25 U.S.C. § 47 and conveniently referred to as the "Buy Indian" Act, we must necessarily point out that it confers no substantive authority to contract for anything. See our memorandum of June 20, 1969, to the Assistant Secretary,

Public Land Management. The codified language quoted above was actually a proviso in a section of the 1910 Act which in its entirety reads as follows:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States. Provided, that so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed.

Section 3709 of the Revised Statutes, referred to in the quoted language, is codified as 41 U.S.C. § 5 and requires with certain exceptions that "purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals." Its applicability was limited, in the purchase of Indian supplies pursuant to the 1910 Act, by a provision found in the Bureau of Indian Affairs Appropriation Act of May 18, 1916, 39 Stat. 123, 126, which reads as follows:

> Provided further, that section thirty-seven hundred and nine, Revised Statutes, in so far as that section requires advertisement be made, shall apply only to those purchases and contracts for supplies or services, except personal services, for the Indian field service which exceed in the amount the sum of $50 each, and section twenty-three of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and sixty-one), is hereby amended accordingly.

In legal effect, the $50 limitation of the 1916 amendment was raised to $100 by a provision found in the Act of January 25, 1927, 44 Stat. 934, 936.

The part of Section 23 of the 1910 Act which was not codified as 25 U.S.C. § 47 was, as amended by the 1916 Act, and modified by the 1927 Act, codified as 25 U.S.C. § 93. The net result was a statutory requirement that all contracts in excess of $100 for the purchase of Indian supplies had to conform to the advertising requirements of Section 3709 of the Revised Statutes, except that "purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior."

That portion of the amended and modified 1910 Act which was codified as 25 U.S.C. § 93, and which required compliance with Section 3709 of the Revised Statutes for non-Indian industry Indian supplies contracts in excess of $100, was repealed by Section 4 of the Act of October 10, 1940, 54 Stat. 1109, 1112. The 1940 Act was a substantive enactment of earlier exceptions to Section 3709 of the Revised Statutes, including that previously codified as 25 U.S.C. § 93, and permitted open-market purchasing of supplies by all bureaus of the Department where the aggregate amount of the purchase or service did not exceed $100 in any one instance. The 1940 exemption was

in turn repealed by Section 9(b) of the Act of August 2, 1946, 60 Stat. 809, which engrafted general exceptions on Revised Statutes § 3709 but left unaffected the provisions for open-market purchasing of "the products of Indian industry."

Thus, there is no question of the survival of the authority for negotiated purchases of the products of Indian industry, at least until and, we believe, after, the enactment of the procurement provisions of the Federal Property and Administrative Services Act of June 30, 1949, 63 Stat. 393. For convenience that act, as amended, will be hereinafter be cited to Title 41, United States Code.

41 U.S.C. § 252(a) provides in part that executive agencies shall, with certain exceptions not here material, make purchases and contracts for property and services in accordance with the provisions of the act and the implementing regulations of the Administrator of General Services. That being so, Section 252(c) of Title 41 is applicable:

> (c) All contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if
>
> * * * * *
>
> (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

Section 260 of Title 41 provides that any provision of law which authorizes an executive agency to pro-

cure any property or services without advertising "shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of the title [quoted above] without regard to the advertising requirements of sections 252(c) and 253 of this title." Thus, we have no difficulty in concluding that the open-market procurement authorized by 25 U.S.C. § 47 is, to the extent of its literal applicability and except as elsewhere limited by statute, "otherwise authorized by law" within the meaning of 41 U.S.C. §§ 252(c)(15) and 260. In applying this exception to the advertising requirements of 41 U.S.C. §§ 252(c) and 253, full compliance with 41 U.S.C. §254 is mandatory. The same is true of the advance payments limitations of 41 U.S.C. § 255, and of the laws specifically made applicable by 41 U.S.C. § 258.

If we are correct in our conclusion that the Federal Property and Administrative Services Act of 1949, as amended, is applicable to Bureau of Indian Affairs procurement, and we believe the literal and mandatory language of the act makes this conclusion inescapable, then 25 U.S.C. § 47 may have considerable significance as an exception to the advertising requirements of 41 U.S.C. §§ 252(c) and 253. Before proceeding, however, it is necessary to examine the provisions of 41 U.S.C. § 252(e):

> (e) This section shall not be construed to (A) authorized the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any con-

> tract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (9)-(11), or (13) of subsection (c) of this section.

The language just quoted is in the form of an explanation or admonition, not a prohibition. It has been explained by the General Counsel of the General Services Administration in this way:

> (e) *No change in requirements regarding construction. repair, etc.*—For clarity, this subsection provides that section [252] does not change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items to be negotiated without advertising as required by section [253] except in the cases as specified in the subsection.[1]

We observe that among the subsection's enumeration of paragraphs of 41 U.S.C. § 252(c) which are excepted from the admonition that § 252 does not authorize negotiated construction and repair contracts, paragraph (15) ("otherwise authorized by law") is not listed. We do not believe the omission is critical to a determination that if negotiated construction and repair contracts are "otherwise authorized by law" they are not subject to the advertising requirements of 41 U.S.C. § 253, and we so hold.[2]

[1] *Federal Property and Administrative Services Act of 1949, as amended, with Analysis and Index*, p. 71 (GC, GSA, Rev. 1958).

This brings us back to the question presented, viz, does 25 U.S.C. § 47 authorize negotiated construction contracts with Indians? The basic question is whether roads, buildings, sewers, utility systems, and the like may be considered to be the "products of Indian industry." We have found no judicial or Departmental decision on the point. There is no meaningful legislative history to indicate the intention of the Congress. There are no qualifying words or phrases elsewhere in the underlying statute. There is no inherent inconsistency in phrase itself. In short, we need only to define the language in its usual sense.

"Product" is defined in Webster's Third International Dictionary (1961) as:

> * * * something produced by physical labor or intellectual effort: the result of work or thought
>
> * * *.

In *Great Western Broadcasting Corporation* v. *N. L. R. B.*, 310 F.2d 591, 595 (9th Cir. 1962), the court said:

> In its broadest sense, the time "product" denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise per-

[2] This section "does not authorize *or change the existing requirements* for authorization for the erection or repair of buildings, roads, sidewalks, or similar items." (Emphasis added) See 1949 U.S. Code Cong. & Adm. News, 1457, 1498.

mits, to refer to a completed service as a "product."

"Industry" in its usual sense is defined, again in Webster's Third International Dictionary (1961), as:

> * * * a use or application of skill or cleverness * * * diligence in an employment or pursuit * * *.

Putting these definitions together, we believe that 25 U.S.C. § 47 will permit the negotiation of contracts, where substantive authority exists, for the purchase by your Bureau of the end product of physical labor or intellectual effort and requiring skill or diligence, of, by, and from Indians. This would include construction and repair of roads, bridges, buildings, and similar things, as well as supplies and services.

In reaching this conclusion, we rely in part on what you represent to be a long period of uninterrupted administrative interpretation of the law. One of the documents submitted with your memorandum reports that "during the past ten years the Bureau has negotiated thousands of contracts with Indians for construction work. The emphasis has occurred in recent years when it has not been uncommon to negotiate as many as 130 contracts for construction work in any given fiscal year. While the monetary value of these contracts has remained below the $100,000 level, there have been contracts for over $1,000,000." Under these circumstances, the administrative construction of the statute, implemented by unchallenged practice for many years, is entitled to great weight.[3] *United States* v. *Jackson*, 280 U.S. 183, 193 (1930); *Udall* v. *Tallman*, 380 U.S. 1 (1965). In addition, the views herein expressed are consistent with the present position of Assistant General Counsel, Division of Business and Administrative Law, Department of Health, Education and Welfare, as stated in his memorandum of September 25, 1970, to the Acting Director, Office of Procurement and Material Management, of that Department.

/s/ Mitchell Melich
MITCHELL MELICH
Solicitor

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[3] We also understand that the appropriations committees of the Congress have been informed of proposals to contract with Indians under the "Buy Indian" Act for construction and maintenance. See e.g., *Hearings on H.R. 12781 before a Subcommittee of the Senate Committee on Appropriations*, 91st Cong., 1st Sess. Pt. 1, pp. 190-194 (1969).

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